Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ENRIQUE HERNANDEZ-CASTILLO,

Petitioner,

v.

ALBERTO R. GONZALES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

SIMON AZAR-FARR
Counsel of Record
SIMON AZAR-FARR & ASSOC., P.C.
2313 North Flores
San Antonio, TX 78212
(210) 736-4122

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Section 212(c) of the Immigration and Nationality Act granted the Attorney General broad discretion to waive the deportation of certain aliens, until it was repealed in 1996. This Court held that the repeal of § 212(c) does not apply retroactively to aliens who would have been eligible for § 212(c) relief at the time they entered a guilty plea. *INS v. St. Cyr*, 533 U.S. 289 (2001). But *St. Cyr* did not address whether the repeal of § 212(c) applies retroactively to aliens found guilty at trial. A circuit split exists on this issue.

The question presented is whether relief from removal under former § 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), is available to an alien who was offered a plea arrangement, but rejected that offer in reasonable reliance on the availability of § 212(c) relief from deportation under the immigration law, before the repeal of that section by the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) of 1996, Div. C., Department of Defense Appropriations Act, Pub. L. 104-208, (Sept. 30, 1996), 110 Stat. 3009 (as amended by Pub. L. 104-302, § 2 (Oct. 11, 1996), 110 Stat. 3656).

PARTIES TO THE PROCEEDING

The Petitioner here is Enrique Hernandez-Castillo.

The Respondents here are:

Alberto R. Gonzales, U.S. Attorney General

Marc J. Moore, as Field Office Director for Detention and Removal for the Bureau of Immigration and Customs Enforcement,

Bureau of Immigration and Customs Enforcement, as an Agency of the Government of the United States of America,

Department of Homeland Security, as an Agency of the Government of the United States of America,

Michael Chertoff, Secretary, Department of Homeland Security.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Enrique Hernandez-Castillo, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 436 F.3d 516 (CA5 2006).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 12, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c), provides, "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . ."

STATEMENT OF THE CASE

A. Legal Background

Section 212 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182, excludes several classes of aliens from the United States. Section 212(c) granted to the Attorney General broad discretion to admit excludable aliens. Although the language of the statute, if literally applied, affects only exclusion hearings, it has been interpreted to also apply to deportation hearings. *See INS v. St. Cyr*, 533 U.S. 289, 295-96 (2001).

The Attorney General's discretion in granting § 212(c) relief is guided by several factors including (1) the existence of substantial family ties in the United States, (2) long-term residence in the United States, (3) evidence of hardship to family if alien is deported, (4) service in the Armed Forces, (5) the alien's history of employment, (6) property of business ties, (7) value and service to the community, (8) rehabilitation, when a criminal conviction is at issue, and (9) other evidence of good moral character. The adverse factors are: (1) the nature and circumstances of the exclusion ground at issue, (2) additional significant violations of U.S. immigration laws, (3) the existence of criminal record and its nature, recency, and seriousness, and (4) other evidence of bad moral character. *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978). If the discretionary relief is granted, the deportation proceeding is terminated and the alien remains a permanent resident.

As this Court has noted, "the class of aliens whose continued residence in this country has depended on their eligibility for § 212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for § 212(c) relief have been granted. Consequently, in the

period between 1989 and 1995 alone, § 212(c) relief was granted to over 10,000 aliens." *St. Cyr*, 533 U.S. at 295-96 (footnotes omitted).

Section 212(c) was repealed in 1996 by the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) of 1996, Div. C., Department of Defense Appropriations Act, Pub. L. 104-208, (Sept. 30, 1996), 110 Stat. 3009 (as amended by Pub. L. 104-302, § 2 (Oct. 11, 1996), 110 Stat. 3656). IIRIRA became effective on April 1, 1997.[1]

The Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) established a presumption against applying federal statutes retroactively. This presumption is based on "[e]lementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *St. Cyr*, 533 U.S. at 316. As such, the Court has established a two-part test to determine whether a law can permissibly apply to conduct performed before the law was enacted. *Landgraf*, 511 U.S. at 280. First, a reviewing court must determine whether Congress intended a retroactive application. *Id.* Even though there is a presumption against retroactivity, Congress has the power to apply laws retroactively when it expresses the clear intent to do so. *Id.* at 268. Second, if Congress has not expressed a clear intent to apply the law retroactively,

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[1] Section 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA), P.L. 104-132, 110 Stat. 1214 (Apr. 24, 1996), also restricted the availability of § 212(c) relief for aliens convicted of a number of felonies; although this limitation of § 212(c) is not relevant to Petitioner's situation, as it applies to more serious crimes than he was convicted of, it is relevant to the circuit split regarding the retroactive repeal of § 212(c) as it applies to aliens convicted prior to the repeal of § 212(c).

a reviewing court must decide whether applying the law to prior conduct would have an impermissible retroactive effect. *Id.* at 280. A law has an impermissible retroactive effect when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability" regarding past conduct. *Id.* at 269, *St. Cyr*, 533 U.S. at 321. If such an effect exists, the presumption against retroactivity applies preventing the law from being applied retroactively.

Relying on *Landgraf*, the Supreme Court in *St. Cyr* held that § 212(c) relief is available to aliens "whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." 533 U.S. at 326. The Court noted that:

> "Two important legal consequences ensued from [St. Cyr's] entry of a guilty plea in March 1996: (1) He became subject to deportation, and (2) he became eligible for a discretionary waiver of that deportation under the prevailing interpretation of § 212(c). When IIRIRA went into effect in April 1997, the first consequence was unchanged except for the fact that the term 'removal' was substituted for 'deportation.' The issue that remains to be resolved is whether IIRIRA § 304(b) changed the second consequence by eliminating respondent's eligibility for a waiver." *Ante* at 314-15.

On this issue, this Court held that "§ 212(c) relief remains available for aliens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c)

relief at the time of their plea under the law then in effect." *Id.* at 326.

The question presented in this case is whether such relief is also available to an alien whose conviction was obtained through a guilty finding by a jury, after a proffered plea agreement was rejected in reasonable reliance on the availability of § 212(c) relief in the event that a guilty verdict be returned.

The Fifth Circuit held that it is not available, explaining that the application of IIRIRA's repeal of § 212(c) does not create an impermissible retroactive effect. *Hernandez-Castillo v. Moore*, 436 F.3d 516 (2006). The First, Second, Fourth and Ninth Circuits have also interpreted *St. Cyr*'s holding to mean that aliens convicted after trial are ineligible for § 212(c) relief. *See Dias v. INS*, 311 F.3d 456, 458 (CA1 2002); *Rankine v. Reno*, 319 F.3d 93, 100 (CA2 2003); *Chambers v. Reno*, 307 F.3d 284 (2002); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121-22 (CA9 2002), *cert. denied*, 539 U.S. 902 (2003).

However, each of these cases relied on the assumption that the aliens who were found guilty could not have changed their behavior in reliance on the availability of § 212(c) relief. Such an assumption is applicable only for aliens who were not offered a plea agreement, i.e. those who had no choice but to go to trial. The Third Circuit recognized the distinction between defendants who went to trial involuntarily and those who chose trial over a plea bargain, explaining that aliens who "affirmatively turned down a plea agreement had a reliance interest in the potential availability of § 212(c) relief." *Ponnapula v. Ashcroft*, 373 F.3d 480, 494 (CA3 2004). *Ponnapula* held that application of IIRIRA's repeal of § 212(c) to aliens who

rejected a plea agreement prior to IIRIRA's enactment creates an impermissible retroactive effect. *Id.*

B. Facts

Petitioner Mr. Enrique Hernandez-Castillo is a native and citizen of Mexico who has resided in the United States for more than 30 years. Mr. Hernandez-Castillo was admitted into this country as a lawful permanent resident on April 15, 1985, and he has considerable family, employment and property interests in the United States. In 1989, Mr. Hernandez-Castillo was charged with the offense of indecency with a minor. He rejected a plea agreement offered by the prosecutor, and was found guilty by a jury on September 13, 1989.

Eleven years later, in 2001, the Immigration and Naturalization Service (INS) (now known as the Bureau of Immigration and Customs Enforcement (ICE)) served Mr. Hernandez-Castillo with a Notice to Appear (NTA), initiating removal proceedings. Mr. Hernandez-Castillo conceded that he was subject to removal as charged, but requested relief from removal under § 212(c) pursuant to the authority of *INS v. St. Cyr*, 533 U.S. 289 (2001), and filed an application with the Immigration Judge (IJ) to that effect.

Had the Immigration and Naturalization Service (INS) attempted to deport Mr. Hernandez-Castillo within the first six years after his conviction, he would have been eligible for waiver of deportation under § 212(c). Under § 212(c), an alien is eligible to apply for discretionary relief from deportation when he has served a term of imprisonment less than five years and he has accrued seven years of lawful residence in the United States. 8 U.S.C. § 1182(c) (repealed 1996). However, the IJ read *St. Cyr* to allow for

§ 212(c) relief only if the alien's conviction was pursuant to a guilty plea. Finding that he was convicted pursuant to a jury trial rather than a guilty plea, the IJ held that he was statutorily ineligible for such relief and pretermitted his request. Mr. Hernandez-Castillo was ordered removed by the IJ on November 19, 2002.

After filing a timely appeal with the BIA, his removal order was affirmed without opinion on March 8, 2004. While an original application to the District Court for a writ of habeas corpus was pending, Mr. Hernandez-Castillo was removed to Mexico on August 9, 2004.

On August 20, 2004, Respondents filed a motion to dismiss Petitioner's application for a writ of habeas corpus. The District Court initially denied Respondents' motion to dismiss on January 7, 2005, finding "persuasive" Petitioner's position regarding the applicability of the *St. Cyr* holding to aliens who had affirmatively rejected a plea agreement. *Hernandez-Castillo v. Moore*, 402 F. Supp. 2d 749, 752 (W.D. Tex. 2005). But on March 10, 2005, the District Court granted Respondent's motion to dismiss. The District Court found that while it had subject matter jurisdiction, "evidence does not show that [Petitioner] was offered a plea." *Hernandez-Castillo v. Moore*, No. SA-04-CA-0710 (W.D. Tex. Mar. 10, 2005).

The Court of Appeals for the Fifth Circuit heard Mr. Hernandez-Castillo's appeal, at which evidence was presented showing that Mr. Hernandez-Castillo was in fact offered a plea, and that he denied it in partial reliance on the availability of § 212(c) relief in the event that a guilty verdict was returned. The court applied the *Landgraf* two-step process for determining if the repeal of § 212(c) had an impermissible retroactive effect. *Hernandez-Castillo v.*

Moore, 436 F.3d at 519. Finding that repeal of § 212(c) did not create an impermissible retroactive effect where the conviction was not the result of a plea, the Fifth Circuit upheld the District Court's dismissal of Mr. Hernandez-Castillo's application for a writ of habeas corpus and denied him eligibility for § 212(c) relief.

REASONS FOR GRANTING THE PETITION

This Court should resolve the split among the circuits as to whether aliens who relied upon the availability of § 212(c) relief when turning down a plea agreement continue to be eligible for such relief after the repeal of § 212(c) by IIRIRA and AEDPA.

It is inherently arbitrary for the eligibility of an alien for § 212(c) relief to depend solely on geography, such that aliens in Pennsylvania who elected, prior to the passage of IIRIRA and AEDPA, to exercise their constitutional right to a jury trial instead of agreeing to a plea bargain are eligible for such relief, whereas similarly situated aliens in Texas are not.

This Court should reaffirm its holding in *Landgraf* that there is a presumption against retroactive application of a statute to events that occurred prior to the statute's enactment if such application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. The Court has established a two-part test to determine whether a law can permissibly apply to conduct performed before the law was enacted. *Id.* First, a reviewing court must determine whether Congress intended a retroactive

application. *Id.* Even though there is a presumption against retroactivity, Congress has the power to apply laws retroactively when it expresses the clear intent to do so. *Id.* at 268. Second, if Congress has not expressed a clear intent to apply the law retroactively, a reviewing court must decide whether applying the law to prior conduct would have an impermissible retroactive effect. *Id.* at 280. If such an effect exists, the presumption against retroactivity applies preventing the law from being applied retroactively. In determining whether a law has a retroactive effect, courts "should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Martin v. Hadix*, 527 U.S. 343, 358 (1999); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 301 (CA5 2002).

In *St. Cyr*, the Supreme Court concluded that Congress had not expressed clear intent that IIRIRA be applied retroactively to bar § 212(c) relief for aliens who were convicted subject to a plea agreement. *St. Cyr*, 533 U.S. at 316-317. *St. Cyr* came to this conclusion regarding aliens who had been convicted pursuant to a guilty plea. 533 U.S. at 326. The Court in *St. Cyr* explained:

> "IIRIRA's elimination of any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly 'attaches a new disability, in respect to transactions or considerations already past.' *Landgraf*, 511 U.S. at 269. Plea agreements involve a quid pro quo between a criminal defendant and the government. In exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous 'tangible benefits,

> such as promptly imposed punishment without the expenditure of prosecutorial resources.' There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions. That an alien charged with a crime . . . would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial is well-documented. Preserving the [alien]'s right to remain in the United States may be more important to the [alien] than any potential jail sentence. Given the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA, preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial. *Ante* at 321-23 (most internal citations and all footnotes omitted, parentheticals included).

Further, as the Third Circuit has recently stated, "the elimination of any possibility of former § 212(c) relief by IIRIRA has an obvious and severe retroactive effect on [the alien] . . . who relied on settled expectations of the immigration laws in place at the time he . . . decided to go to trial" as much as it disrupts the settled expectations of those who elect to enter into a plea agreement. *Ponnapula v. Ashcroft*, 373 F.3d 480, 484 (CA3 2004).

Prior to IIRIRA, the § 212(c) discretionary waiver was an available form of relief for all lawful permanent residents convicted of a crime who were otherwise eligible for such relief. Neither the case law nor the statutory language distinguish in any way between methods of conviction.

Although the Fifth Circuit found that "Hernandez-Castillo's argument . . . equat[ing] the refusal to take a plea agreement with detrimental reliance on § 212(c) . . . is nonsensical," *Hernandez-Castillo v. Moore*, 436 F.3d 516, 520, n.3 (2006), logic defies this conclusion. If an alien can express reliance on § 212(c) when *accepting* a plea agreement, surely he can also express such reliance when *refusing* a plea agreement. For example, if the terms of the plea that is offered are such that, if it were accepted, the alien would be ineligible for § 212(c) relief, refusal of the plea would be the *only* way that the alien could hope to remain eligible for § 212(c) relief. An alien faced with the choice between accepting a plea and foregoing all chances of § 212(c) relief on the one hand, and facing a jury trial with the possibility of acquittal or of conviction on a lesser charge or of sentencing to less than the five year maximum on the other hand, could well opt for a jury trial *in full reliance* on the possibility of § 212(c) relief.

Retroactively applying IIRIRA to those convicted after a trial also creates a new disability regarding past conduct. Under § 212(c), an alien could elect to go to trial and then seek discretionary relief, if convicted, provided he was otherwise qualified under the statute. However, if IIRIRA is retroactively applied, a person convicted after trial would be prevented from seeking discretionary relief, even if he is otherwise qualified. This clearly changes the legal consequences of electing to exercise one's federal constitutional right to go to trial from what they were when the decision to go to trial was made. *See Martin v. Hadix*, 527 U.S. at 357-358 ("[T]he [retroactivity] inquiry demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'")

(internal citation omitted). Indeed, IIRIRA makes what was a *possibility* of deportation after an unsuccessful trial a *certainty*. *Ponnapula v. Ashcroft*, 373 F.3d at 485. This result violates the underlying doctrine of the presumption against retroactivity that individuals should be placed on fair notice of what the law is so that they can conform their conduct and make decisions accordingly. *Landgraf*, 511 U.S. at 265.

St. Cyr focused on the reasonable reliance aliens have on seeking discretionary relief when deciding to take a plea. 533 U.S. at 321-22. However, the same reliance implications exist when a person elects to go to trial. The same considerations regarding length of punishment, possible immigration consequences, and the likelihood of success at trial are present. Simply because a person chooses to assert his innocence does not mean that he is not relying on the possibility of discretionary immigration relief in the event that he is unsuccessful at trial. Certainly, any person facing trial considers the possible positive and negative outcomes and makes his choice accordingly. In the instant case, Mr. Hernandez-Castillo was offered the ability to enter into a plea agreement, and plead guilty. He faced the choice of accepting that plea, or asserting his constitutional right to assert his innocence and face trial. At the time Mr. Hernandez-Castillo made this decision, § 212(c) was clearly available to him whether he accepted the guilty plea, or whether he chose to assert his constitutional right to go to trial.

Some circuits have asserted that a person who elects to go to trial has no reliance interest in § 212(c) relief. *See Armendariz-Montoya v. Sonchik*, 291 F.3d at 1121 ("[A]liens who elected a jury trial cannot plausibly claim that they would have acted any differently if they

had known about [IIRIRA]."); *Rankine v. Reno*, 319 F.3d at 99 ("The claim that they relied on the availability of § 212(c) relief in making their decision to go to trial is somewhat hollow"). With all due respect to these circuits, their conclusions are not supported by the reality facing an alien when he makes a decision to plead or to try the charge brought against him. With respect to the Ninth Circuit's view, the alien can surely, and quite plausibly, claim that he would have only sought a plea bargain had he known prior to the enactment of the AEDPA and the IIRIRA that making the decision to go to trial would have rendered him completely ineligible for § 212(c) relief. With respect to the Second Circuit's position, there is nothing hollow about an alien's calculation pre-AEDPA and pre-IIRIRA to roll the dice and go to trial and, if convicted, still retain the right under the law at the time to seek relief under INA § 212(c). As the Third Circuit recently stated:

> "There are many reasons to proceed to trial – the lack of a plea agreement that would ensure eligibility for § 212(c) relief, the hope of an acquittal, or the simple desire to exercise fundamental constitutional rights – but few if any of them are inconsistent with preserving a contingent interest in § 212(c) relief." *Ponnapula v. Ashcroft*, 373 F.3d at 488.

The Third Circuit further pointed out that actual reliance is not required to prove an impermissible retroactive effect. *Id.* at 484. Reasonable reliance is sufficient. Those circuits that have allowed IIRIRA to apply retroactively to aliens who elected to go to trial have asserted that an alien who pleads guilty has a more immediate reliance interest because they are giving up certain constitutional rights in the expectation of receiving § 212(c) relief, whereas an alien who goes to trial is relying on

being acquitted. *See Rankine*, 319 F.3d at 102. But that is simply not correct. The act of giving up one's right to exercise constitutional rights had no bearing on being granted § 212(c). The balancing of the positive and negative factors that went into the decision whether to grant § 212(c) did not include whether one gave up one's right to exercise certain constitutional rights to trial by a jury. *See generally Matter of Marin*, 16 I. & N. Dec. 581.

At any rate, even though the reliance of a person who decides to assert his innocence may be more attenuated does not mean that it is non-existent. Attenuation has not been determinative in the Supreme Court's treatment of retroactivity. *See Landgraf*, 311 U.S. at 283 n.35. A person who elects to go to trial can be reasonably relying on the availability of discretionary relief in the event they are convicted, and this reliance comes from the fact that under § 212(c), discretionary relief was available to those who pled guilty and those who were convicted after a trial.

Some circuits retroactively applying IIRIRA to aliens convicted after trial have asserted that when aliens elect to have a trial they cannot be relying on discretionary relief because there is a possibility of receiving a higher sentence that would render the person ineligible for such relief. *See Chambers v. Reno*, 307 F.3d at 291 ("by rolling the dice and going to trial, Chambers actually ensured that his eligibility would remain uncertain"). This argument is flawed for a number of reasons. First, whether the availability of § 212(c) relief is certain is not determinative of whether there is an impermissible retroactive effect. Further, while in some cases it may be true that a jury trial would result in a higher sentence, there still remains the possibility that the alien would be eligible for § 212(c) relief. An alien may elect to go to trial, knowing that he

may possibly foreclose his eligibility for § 212(c) relief should the sentence be so long that the relief is not available, but also relying on the possibility that the sentence will not be so long that relief is not available. That same alien may not choose to go to trial if it is certain that § 212(c) relief would be unavailable if found guilty, and thus the alien has still acted in reliance on the possibility of § 212(c) relief.

In *St. Cyr*, the Court held that the IIRIRA repeal of § 212(c) could be applied to any alien who pled guilty, not just those aliens that pled guilty to sentences that guaranteed the continued availability of discretionary relief. 533 U.S. at 326. Indeed, St. Cyr himself had accepted a plea of over five years, which if fully served would have rendered him ineligible for § 212(c) relief. Thus, St. Cyr was not guaranteed that § 212(c) relief would be available at the time he decided to enter a plea of guilty and yet the Court clearly recognized his reliance interest in discretionary relief. This "confirms that *Landgraf's* limitations on the repeal of former § 212(c) are construed broadly in favor of those who had even a partial or contingent reliance interest in the existing state of the law." *Ponnapula*, 373 F.3d at 486-88.

Aliens who choose to assert their innocence in a trial have a reasonable contingent reliance interest in § 212(c) relief when their convictions are entered before the enactment of IIRIRA. Certainly these aliens hope that they will be acquitted and that discretionary relief will be unnecessary. However, it makes no sense, and it is without merit, to assert that people who choose to exercise a federal constitutional right to have a trial have no reliance interests in what could happen if they are unsuccessful in establishing that they are not guilty. Clearly people have

reliance interest in what will happen to them in the criminal justice system after a *conviction*, and there is no reason to hold that they do not have the same reliance interest in what will happen to them regarding immigration proceedings. In the instant case, Mr. Hernandez-Castillo was faced with the decision of accepting a plea, or exercising his guaranteed constitutional right to maintain his plea of not guilty and to proceed to a jury trial. At the time Mr. Hernandez-Castillo made his decision, § 212(c) relief was available regardless of the choice that he made. Thus it cannot be said that he did not rely on the immigration consequences of choosing to go to trial.

The IIRIRA repeal of § 212(c) relief has an impermissible retroactive effect as applied to aliens convicted pursuant to a trial verdict before IIRIRA was enacted. Such application upsets the settled expectations of immigration law as it existed at the time of conviction and imposes additional retroactive liability on the choice to proceed with a trial rather than plead guilty. As such, under *Landgraf*, the application of the IIRIRA repeal of § 212(c) to aliens in this context violates the presumption against retroactivity mandated by the Supreme Court in *St. Cyr*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SIMON AZAR-FARR
Counsel of Record
SIMON AZAR-FARR & ASSOC., P.C.
2313 North Flores
San Antonio, TX 78212
(210) 736-4122

In the
United States Court of Appeals
for the Fifth Circuit

No. 05-50543
Summary Calendar

ENRIQUE HERNANDEZ-CASTILLO,

Petitioner-Appellant,

VERSUS

MARC J. MOORE, AS FIELD DIRECTOR FOR DETENTION AND REMOVAL FOR THE IMMIGRATION AND CUSTOMS ENFORCEMENT; BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT, AS AN AGENCY OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA; DEPARTMENT OF HOMELAND SECURITY, AS AN AGENCY OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA; MICHAEL CHERTOFF, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; ALBERTO R. GONZALES, U.S. ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court
for the Western District of Texas

(Filed January 13, 2006)

Before SMITH, GARZA, and PRADO, Circuit Judges.

Enrique Hernandez-Castillo, a removed alien, challenges the ruling of an immigration ("IJ") that he is not eligible for a waiver of removal under now-repealed

§ 212(c) of the Immigration and Nationality Act ("INA"). Treating this action as a petition for review, and agreeing with the ruling of the IJ, we vacate the finding of habeas jurisdiction and deny the petition for review.

I.

Hernandez-Castillo, a native and citizen of Mexico, was admitted into the United States as a lawful permanent resident in 1985. In 1989 he was tried to a jury and convicted of felony indecency with a child. The Immigration and Naturalization Service ("INS")[1] initiated removal proceedings against Hernandez-Castillo in 2001, asserting that (1) he was removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) on the ground that he had been convicted of an "aggravated felony," which is defined by 8 U.S.C. § 1101(a)(43)(A) to include sexual abuse of a minor, and (2) he was removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(i) because he had been convicted of a crime of moral turpitude, for which a sentence of one year or longer could have been imposed, within five years after his admission into the United States.

Hernandez-Castillo conceded that he was removable as charged, but requested a waiver of removal under § 212(c), a provision that was formerly codified at 8 U.S.C. § 1182(c) but had been repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

[1] The INS ceased to exist on March 1, 2003. Its enforcement functions have been assumed by the Bureau of Immigration and Customs Enforcement ("BICE"), an agency within the Department of Homeland Security. Because many of the events in this case took place before the reorganization of immigration enforcement duties, we continue to refer to the agency as the INS.

("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009-597. The repeal was effective immediately upon its enactment.

Hernandez-Castillo argued that despite the repealer, he is entitled to pursue relief under that provision pursuant to *INS v. St. Cyr*, 533 U.S. 289, 326 (2001), in which the Court stated that "§ 212(c) relief remains available for aliens . . . whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect."

The IJ found that Hernandez-Castillo was ineligible for § 212(c) relief, *St. Cyr* notwithstanding, because he had been convicted of a removable offense following a jury trial rather than through a guilty plea. In November 2002 the IJ ordered that Hernandez-Castillo be removed to Mexico. Hernandez-Castillo filed a timely appeal to the BIA, which affirmed the removal order without opinion in March 2004.

On August 9, 2004 (the same day on which he had been ordered to report to the San Antonio office of the Department of Homeland Security for removal), Hernandez-Castillo filed a petition for writ of habeas corpus challenging the removal order on the ground that he had been unlawfully denied the right to seek a waiver of the order. He also requested a temporary restraining order and preliminary injunctive relief to prevent the immigration authorities from removing him before the district court ruled on the habeas petition. But, because the removal had been scheduled to take place on that very day, Hernandez-Castillo was removed to Mexico before the district court could rule on the request for a temporary restraining order.

On August 20, 2004, the government filed a motion to dismiss the habeas petition, which the district court granted in March 2005, after first finding that it had jurisdiction to entertain the petition. The court held that Hernandez-Castillo was ineligible for § 212(c) relief. Hernandez-Castillo appealed that order on March 29, 2005.

II.

After Hernandez-Castillo filed his appeal, Congress on May 11, 2005, enacted the REAL ID Act, Pub.L. No. 109-13, 119 Stat. 231. The Act explicitly forecloses habeas review of removal orders and provides that a petition for review is the sole and exclusive means of judicial review for all removal orders except those issued pursuant to 8 U.S.C. § 1225(b)(1). *See* Pub.L. No. 109-13, 119 Stat. 231, 310, § 106(a)(1)(B). The Act specifies that a habeas petition pending before a district court as of the REAL ID Act's effective date is to be transferred to the appropriate court of appeals and converted into a petition for review. *See* Pub.L. No. 109-13, 119 Stat. 231, 311, § 106(c). Congress did not, however, dictate what was to be done with habeas petitions, such as Hernandez-Castillo's, that were already on appeal as of the REAL ID Act's effective date.

Nevertheless, we recently held in *Rosales v. BICE,* 426 F.3d 733, 736 (5th Cir. 2005) (per curiam), *cert. denied*, 2006 U.S. LEXIS 619 (U.S. Jan. 9, 2006), that "despite Congress's silence on this issue, habeas petitions on appeal as of May 11, 2005, . . . are properly converted into petitions for

review."[2] Pursuant to the REAL ID Act, we therefore vacate the district court's finding of habeas jurisdiction and convert the habeas petition into a petition for review of the removal order.

III.

We must now determine whether we have jurisdiction to entertain this petition for review under the REAL ID Act. The Act amends 8 U.S.C. § 1252(a)(2)(C) to preclude all judicial review, habeas or otherwise, where a removal order is based on, *inter alia,* the alien's commission of an aggravated felony. *See* Pub.L. No. 109-13, 119 Stat. 231, 310, § 106(a)(1)(A)(ii). The Act also altered the INA to provide that

> [n]othing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

8 U.S.C. § 1252(a)(2)(D). Because Hernandez-Castillo's claim that the IJ erred in applying the repeal of § 212(c) to his case presents a question of law, we have jurisdiction to consider the petition.

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[2] The Third and Ninth Circuits have reached the same conclusion. *See Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1052-53 (9th Cir. 2005); *Bonhometre v. Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005).

IV.

We review the BIA's conclusions of law *de novo*, although we defer to the BIA's interpretation of immigration regulations if that interpretation is reasonable. *See Lopez-Gomez v. Ashcroft*, 263 F.3d 442, 444 (5th Cir. 2001). Although we generally have authority to review only the order of the BIA, where, as in this case, the BIA summarily affirms the ruling of the IJ without an opinion, we review the IJ's order. *See Mikhael v. INS*, 115 F.3d 299, 302 (5th Cir. 1997). In this case, no deference is owed to the IJ's conclusion of law regarding the availability of § 212(c) relief because that conclusion was based on principles of retroactivity rather than the content of the immigration regulations.

There is a two-step process for determining whether a statute (or the repeal thereof) has an impermissible retroactive effect. First, a statute must be given retroactive effect if Congress has communicated, with clarity, its intent that the law be applied retroactively. *See St. Cyr*, 533 U.S. at 316 (citing *Martin v. Hadix*, 527 U.S. 343, 352 (1999)). Second, where a clear statement from Congress is lacking, there is an impermissible retroactive effect where the application of the statute "attaches new legal consequences to events completed before [the statute's] enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994).

In *St. Cyr*, the Court held that in repealing § 212(c), Congress did not give a clear indication of its intent retroactively to strip the availability of § 212(c) relief away from aliens convicted of removable offenses before the enactment of IIRIRA. *St. Cyr*, 533 U.S. at 320. In addition, the Court held that "IIRIRA's elimination of any possibility

of § 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly attaches a new disability, in respect to transactions or considerations already past." 533 U.S. at 321 (internal citations and quotations omitted). Therefore, the Court concluded that the repeal of § 212(c) cannot apply retroactively to pre-enactment convictions of a removable offense pursuant to a guilty plea.

The Court did not address whether the application of IIRIRA to pre-enactment convictions following a jury trial, rather than pursuant to a guilty plea, yields an impermissible retroactive effect. In the wake of *St. Cyr*, at least two circuits have concluded that there is no impermissible retroactive effect where the conviction was not the result of a plea. *See Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002); *Rankine v. Reno*, 319 F.3d 93 (2nd Cir. 2003). The *Rankine* court stated that

> aliens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty. . . . First, none of these petitioners detrimentally changed his position in reliance on continued eligibility for § 212(c) relief. . . . Second, the petitioners have pointed to no conduct on their part that reflects an intention to preserve their eligibility for relief under § 212(c) by going to trial. If they had pled guilty, petitioners would have participated in the *quid pro quo* relationship, in which a greater expectation of relief is provided in exchange for forgoing a trial, that gave rise to the reliance interest emphasized by the Supreme Court in *St. Cyr.* As the Court made clear, it was that reliance, and the consequent change of immigration status, that produced the impermissible retroactive effect of IIRIRA. *St. Cyr*, 533 U.S. at 325. . . .

> Here, petitioners neither did anything nor surrendered any rights that would give rise to a comparable reliance interest.

Rankine, 319 F.3d at 99-100. We adopt this reasoning and conclude that the application of IIRIRA's repeal of § 212(c) to Hernandez-Castillo does not create an impermissible retroactive effect. Accordingly, we agree with the IJ's order declaring Hernandez-Castillo ineligible for § 212(c) relief.[3]

In summary, we VACATE the district court's finding of habeas jurisdiction, convert the habeas petition into a petition for review, and DENY the petition for review.

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[3] Hernandez-Castillo contends that he should now be given an opportunity to present evidence that he had been offered a plea agreement before his trial for felony indecency with a child and chose instead to take his chances with a jury because § 212(c) relief might be available to him if he were convicted at trial. He equates the refusal to take a plea agreement with detrimental reliance on § 212(c). As the *Rankine* court makes clear, however, Hernandez-Castillo's argument is nonsensical:

> Unlike aliens who entered pleas, the petitioners made no decision to abandon any rights and admit guilt – thereby immediately rendering themselves deportable – in reliance on the availability of the relief offered prior to IIRIRA. The petitioners decided instead to go to trial, a decision that, standing alone, had no impact on their immigration status. Unless and until they were convicted of their underlying crimes, the petitioners could not be deported. The claim that they relied on the availability of § 212(c) relief in making the decision to go to trial is therefore somewhat hollow. . . ."

Rankine, 319 F.3d at 99.

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ENRIQUE HERNANDEZ-CASTILLO Applicant, v. MARC J. MOORE, as Field Office Director for Detention and Removal for the Immigration and Customs Enforcement, et al. Respondent.	§ § § § § § § § §	SA-04-CA-0710

FINAL JUDGMENT

(Filed Mar. 10, 2005)

On this day, the court entered an Order granting Respondent's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The court now entered its Final Judgment pursuant to Federal Rule of Civil Procedure 58.

Accordingly, it is hereby ORDERED that Respondent's Motion to Dismiss be GRANTED and Applicant's claims be DISMISSED WITH PREJUDICE.

It is ORDERED that each party bear its own costs.

It is ORDERED that all pending motions are DENIED AS MOOT.

Signed this 10th day of March, 2005.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES
DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ENRIQUE HERNANDEZ-CASTILLO Applicant, v. MARC J. MOORE, as Field Office Director for Detention and Removal for the Immigration and Customs Enforcement, et al. Respondent.	§ § § § § § § § § §	SA-04-CA-0710

ORDER GRANTING
RESPONDENT'S MOTION TO DISMISS

(Filed Mar. 10, 2005)

Before the Court are Respondent's Motion to Dismiss (Docket No. 9), Applicant's Reply to Respondent's Motion to Dismiss, and the Joint Scheduling Order in which the parties move the Court to decide this matter on the opposing dispositive motions. After due consideration, the Court GRANTS Respondent's Motion to Dismiss.

Applicant Hernandez-Castillo was a resident of the United States for more than thirty years and had been granted permanent resident status in 1985. In 1989, Applicant pleaded "not-guilty" to the offense of indecency to a minor and was found guilty by a jury. There is no evidence in the record that Applicant was offered a plea agreement or that he relied on the possibility of §212(c) relief before going to trial. In 2001, the Immigration and Naturalization Service ("INS") served Applicant with Notice to Appear and initiated removal proceedings.

Applicant's request to the Immigration Judge for relief from removal under §212(c) of the Immigration and Nationality Act, amended as 8 U.S.C. §1982(c), was denied. The immigration judge relied on the Supreme Court decision in *INS v. St. Cyr*[1] and held that Applicant was not statutorily eligible for relief under §212(c) because he was convicted pursuant to a jury verdict rather than a guilty plea. Applicant was ordered removed on November 19, 2002. The Board of Immigration Appeals affirmed the removal order on March 8, 2004 after Applicant's timely appeal.

On the morning of August 9, 2004, Applicant presented himself to the Bureau of Immigration and Customs Enforcement ("ICE") for deportation pursuant to a demand letter. That same morning, Applicant filed with this Court an application for writ of habeas corpus seeking a remand to the BIA for consideration of his application for §212(c) relief. Applicant concurrently filed with this Court a Motion for Temporary Restraining Order ("TRO") and for Preliminary and Permanent Injunction. Before the Court was able to rule on the TRO Motion, Applicant was removed to Mexico. On August 10, 2004, this Court requested that Respondent submit a response to Applicant's Habeas Application. Respondent subsequently filed a Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim upon which relief may be granted. This Court entered an Order Denying Respondent's Motion to Dismiss on January 7, 2005 in order for the parties to conduct further discovery. On March 7, 2005, the parties submitted a Joint Scheduling Order and

[1] 533 U.S. 289 (2000).

stated that the parties "jointly concluded that further discovery at this time would not be feasible." The parties moved the Court to decide the case on the opposing dispositive motions.

The Court already has determined it has habeas jurisdiction over this matter and now holds that Respondent's Rule 12(b)(6) Motion to Dismiss be Granted. Evidence in the record does not show that Applicant was offered a plea or that he relied on the availability of §212(c) for relief. The Court holds that Applicant is ineligible for §212(c) relief and therefore grants Respondent's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

It is so ORDERED.

SIGNED this 10th day of March, 2005.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES
DISTRICT JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ENRIQUE HERNANDEZ-CASTILLO Applicant,	§ § §	
v.	§	SA-04-CA-0710
MARC J. MOORE, as Field Office Director for Detention and Removal for the Immigration and Customs Enforcement, et. al. Respondent.	§ § § § § §	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

(Filed Jan. 7, 2005)

Before the Court are Respondent's Motion to Dismiss (Docket No. 9), Applicant's Reply to Respondent's Motion to Dismiss, and Applicant's Court Advisory Number 1. After due consideration, the Court DENIES Respondent's Motion to Dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

Applicant Hernandez-Castillo was a resident of the United States for more than thirty years and had been granted permanent resident status in 1985. In 1989, Applicant pleaded "not-guilty" to the offense of indecency to a minor and was found guilty by a jury. There is no evidence in the record that Applicant was offered a plea agreement or that he relied on the possibility of §212(c) relief before going to trial. In 2001, the Immigration and

Naturalization Service ("INS") served Applicant with Notice to Appear and initiated removal proceedings. Applicant's request to the Immigration Judge for relief from removal under §212(c) of the Immigration and Nationality Act, amended as 8 U.S.C. §1182(c), was denied. The immigration judge relied on the Supreme Court decision in *INS v. St. Cyr*[1] and held that Applicant was not statutorily eligible for relief under §212(c) because he was convicted pursuant to a jury verdict rather than a guilty plea. Applicant was ordered removed on November 19, 2002. The Board of Immigration Appeals affirmed the removal order on March 8, 2004 after Applicant's timely appeal.

On the morning of August 9, 2004, Applicant presented himself to the Bureau of Immigration and Customs Enforcement ("ICE") for deportation pursuant to a demand letter. That same morning, Applicant filed with this Court an application for writ of habeas corpus seeking a remand to the BIA for consideration of his application for §212(c) relief. Applicant concurrently filed with this Court a Motion for Temporary Restraining Order ("TRO") and for Preliminary and Permanent Injunction. Before the Court was able to rule on the TRO Motion, Applicant was removed to Mexico. On August 10, 2004, this Court requested that Respondent submit a response to Applicant's Habeas Application. Respondent subsequently filed a Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim upon which relief may be granted.

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[1] 533 U.S. 289 (2000).

DISCUSSION

I. Habeas Jurisdiction

The Court first holds that it has habeas jurisdiction over this matter. The U.S. Supreme Court as well as Fifth Circuit precedent make clear that the "in custody" requirement of federal habeas jurisdiction is determined as of the time the habeas petition is filed.[2] Furthermore, the Fifth Circuit has held that "this rule applies to petitioners who have been deported in the same way it applies to any other habeas petitioner no longer in custody."[3] In *Spencer v. Kemna*, the U.S. Supreme Court explained that for a court to exercise habeas jurisdiction over a petitioner no longer in custody, the petitioner must demonstrate (1) that he was in custody at the time he filed the petition, and (2) that his subsequent release continues to present a case or controversy under Article III, § 2 of the Constitution.[4] According to decisions by the Fifth Circuit and other circuits, the bar on readmission of a removed alien is a legally cognizable collateral consequence that preserves a live Article III controversy even after deportation of the petitioner.[5] In this matter, Applicant Hernandez-Castillo filed for writ of habeas corpus with this Court while he was in the ICE's custody and prior to his removal to Mexico. In addition, Applicant's subsequent removal does

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[2] *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *Zalawadia v. Ashcroft*, 371 F.3d 292, 297 (5th Cir. 2004).

[3] *Zalawadia*, 371 F.3d at 297.

[4] *Spencer*, 523 U.S. at 7.

[5] *Zalawadia* at 297; *see Leitao v. Reno*, 311 F.3d 453, 455 (1st Cir. 2002); *see Chong v. District Director, INS*, 264 F.3d 378, 385 (3rd Cir. 2001); *see Smith v. Ashcroft*, 295 F.3d 425, 428 (4th Cir. 2002); *see Zegarra-Gomez v. INS*, 314 F.3d 1124, 1127 (9th Cir. 2003).

not render his claim moot because a collateral consequence of his custody is that he is barred from returning to the United States. Because Applicant filed his habeas petition while he was in custody and continues to face a collateral consequence of the order placing him there, the Court holds that it has habeas jurisdiction.[6] As a result, the Court DENIES Respondent's Motion to Dismiss based on Fed. R. Civ. P. 12(b)(1).

II. Rule 12(b)(6) Motion to Dismiss

For purposes of a Rule 12(b)(6) Motion to Dismiss for failure to state a claim, the complaint must be liberally construed in favor of the plaintiff, and all the facts plead in the complaint must be taken as true.[7] Dismissal on this basis is a disfavored means of disposing of a case,[8] and district courts should avoid such dismissals "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[9] "The question therefore is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief."[10]

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[6] *See Zalawadia* at 301.

[7] *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5th Cir. 1986).

[8] *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 365 (5th Cir. 2000).

[9] *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957).

[10] *Brown v. Nationsbank Corp.*, 188 F.3d 579, 586 (5th Cir. 1999) (citing 5 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 601 (1969)).

The main issue before the Court is whether Applicant Hernandez-Castillo is eligible for §212(c) relief even though he pleaded not guilty to the charges of indecency with a minor and was found guilty by a jury. Circuit courts have adopted different positions concerning the availability for relief under §212(c) for an alien who has been convicted after trial.

The First, Second, and Ninth Circuits have interpreted the Supreme Court *St. Cyr* decision to hold that aliens convicted after trial are ineligible to make a §212(c) claim.[11] These courts have observed that aliens who exercise their right to go to trial do not have the type of reliance interests that the Supreme Court focused on in *St. Cyr.*

Other Circuit Courts of Appeals have taken a contrary perspective. The Third Circuit, for instance, distinguishes between aliens who went to trial because they declined a plea agreement that was offered to them and those who went to trial because they were not offered a plea agreement.[12] The Third Circuit stated in dicta that §212(c) likely would not be available to the aliens in the latter category because they "had no opportunity to alter their course in the criminal justice system in reliance on the availability

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[11] *Dias v. INS,* 311 F.3d 456, 458 (1st Cir. 2002); *Rankine v. Reno,* 319 F.3d 93, 100 (2nd Cir. 2003); *Armendariz-Montoya v. Sonchik,* 291 F.3d 1116, 1121-22 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *see also Lara-Ruiz v. INS,* 241 F.3d 934, 945 (7th Cir. 2001) (distinguishing between aliens who pleaded guilty and those convicted after trial); *see also Brooks v. Ashcroft,* 283 F.3d 1268, 1273-74 (11th Cir. 2002) (finding that the application of §212(c) to aliens previously convicted after trial but not to those who previously pleaded guilty comported with the Sixth Amendment and the Equal Protection Clause).

[12] *Ponnapula v. Ashcroft,* 373 F.3d 480 (3rd Cir. 2004).

of § 212(c) relief."[13] The Third Circuit proceeded to hold that aliens in the former category could make a §212(c) claim because aliens who "affirmatively turned down a plea agreement had a reliance interest in the potential availability of § 212(c) relief."[14]

Despite that the numerical authority of the other Circuit Courts of Appeals' decisions favor Respondent's position, the Applicant's arguments and Third Circuit authority are persuasive. The Court finds that the record in this matter is not fully developed. Additional evidence may reveal whether Applicant was offered a plea agreement and whether he relied on the availability of §212(c) for relief. In cases similar to this one, the United States Supreme Court has counseled that the judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.

As a result of the analysis above, the Court DENIES Respondent's Motion to Dismiss based on Fed. R. Civ. P. 12(b)(6). The Court calls upon the parties to conduct further discovery and submit an agreed scheduling order within 60 days from the date of this Order. The Court then will decide the matter based on the opposing dispositive motions submitted by the parties.

It is so ORDERED.

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[13] *Ponnapula*, 373 F.3d at 494.

[14] *Id.*

SIGNED this 7th day of January, 2005.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES
DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
JUL 28 2006
OFFICE OF THE CLERK

No. 05-1251

In the Supreme Court of the United States

ENRIQUE HERNANDEZ-CASTILLO, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

As a result of 1996 amendments to the Immigration and Nationality Act, a removable alien is ineligible for discretionary relief from removal if the alien was previously convicted of an aggravated felony. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that it would be impermissibly retroactive to apply the 1996 amendments to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The question presented is whether this Court's holding in *St. Cyr* applies to an alien convicted of an aggravated felony at trial.

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In the Supreme Court of the United States

No. 05-1251

ENRIQUE HERNANDEZ-CASTILLO, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 436 F.3d 516. The order and judgment of the district court granting the motion to dismiss (Pet. App. 9-12) are unreported. The order of the district court denying the motion to dismiss (Pet. App. 13-19) is reported at 402 F. Supp. 2d 749. The decisions of the Board of Immigration Appeals (App., *infra*, 1a) and the immigration judge (App., *infra*, 2a-5a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2006. The petition for a writ of certiorari was filed on March 28, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1988) (repealed 1996), authorized a permanent resident alien domiciled in the United States for seven consecutive years to apply for discretionary relief from exclusion. While, by its terms, Section 212(c) applied only to exclusion proceedings, it was construed to apply to deportation proceedings as well. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In the Immigration Act of 1990, Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of an aggravated felony who had served a prison term of at least five years. See Pub. L. No. 101-649, Tit. V, § 511, 104 Stat. 5052. Subsequently, in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of certain offenses, including an aggravated felony, without regard to the amount of time spent in prison. See Pub. L. No. 104-132, Tit. V, § 440(d), 110 Stat. 1277. Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c), see Pub. L. No. 104-208, Tit. III, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by AEDPA, Section 240A makes aggravated felons ineligible for discretionary relief. See 8 U.S.C. 1229b(a)(3).

In *St. Cyr*, *supra*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agree-

ment at a time when the conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326. The question presented in this case is whether this Court's holding in *St. Cyr* applies to an alien convicted of an aggravated felony at trial.

2. Petitioner is a native and citizen of Mexico. In 1985, he was admitted into the United States as a lawful permanent resident. In 1989, a jury found him guilty of felony indecency with a child. In 2001, the Immigration and Naturalization Service (INS) commenced removal proceedings against him.* It alleged that petitioner was deportable because the offense of which he was convicted was both an aggravated felony and a crime involving moral turpitude committed within five years after admission for which a prison term of at least one year may be imposed. Pet. App. 2; see 8 U.S.C. 1101(a)(43)(A), 1227(a)(2)(A)(i) and (iii).

Petitioner conceded that he was deportable but sought discretionary relief from deportation under Section 212(c) of the INA. The immigration judge (IJ) ruled that Section 212(c) relief is unavailable to an alien convicted of an aggravated felony before the 1996 amendments to the INA if the alien was convicted at trial. Because petitioner was convicted at trial, the IJ found that his application for Section 212(c) relief was pretermitted and ordered him removed to Mexico. Pet. App. 2-3; App., *infra*, 2a-5a.

The Board of Immigration Appeals affirmed the IJ's decision without opinion. Pet. App. 3; App., *infra*, 1a.

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* The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. III 2003).

3. Petitioner filed a petition for a writ of habeas corpus, arguing that he had been unlawfully denied the right to seek a waiver of deportation. Pet. App. 3. The respondent in the habeas corpus action, an official with United States Immigration and Customs Enforcement, filed a motion to dismiss, which the district court at first denied. *Id.* at 13-19. Finding the Third Circuit's decision in *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (2004), persuasive, the district court determined that an alien convicted of an aggravated felony at trial before the 1996 amendments to the INA is eligible for relief under Section 212(c) if he rejected a plea offer. Pet. App. 17-18. The court then directed the parties to conduct further discovery addressed to whether petitioner was offered a plea agreement. *Id.* at 18. Approximately two months later, after discovery was completed, the district court granted the motion to dismiss, finding that there was still no evidence in the record that petitioner had been offered a plea agreement. *Id.* at 4, 9-12.

4. The court of appeals vacated the district court's finding of habeas corpus jurisdiction, converted petitioner's habeas corpus petition into a petition for review pursuant to the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Tit. I, § 106, 119 Stat. 310-311, and denied the petition for review. Pet. App. 1-8. The court held that applying the 1996 amendments to the INA to an alien whose aggravated-felony conviction antedates them does not "yield[] an impermissible retroactive effect" when the conviction "follow[s] a jury trial, rather than [being] pursuant to a guilty plea." *Id.* at 7. Quoting the Second Circuit's decision in *Rankine* v. *Reno*, 319 F.3d 93, cert. denied, 540 U.S. 910 (2003), the court of appeals reasoned that "aliens who chose to go to trial are in a different position with respect to [the 1996 amendments to the

INA] than aliens * * * who chose to plead guilty," because the former did not "detrimentally change[] [their] position in reliance on continued eligibility for § 212(c) relief" and can "point[] to no conduct on their part that reflects an intention to preserve their eligibility for relief under § 212(c) by going to trial." Pet. App. 7 (quoting *Rankine*, 319 F.3d at 99-100). The court therefore "agree[d] with the IJ's order declaring [petitioner] ineligible for § 212(c) relief." *Id.* at 8. In a footnote, the court of appeals rejected petitioner's request for "an opportunity to present evidence that he had been offered a plea agreement before his trial," reasoning that, even if there were such evidence, "the refusal to take a plea agreement" would not amount to "detrimental reliance on § 212(c)." *Id.* at 8 n.3.

ARGUMENT

Petitioner contends (Pet. 8-16) that the holding of *St. Cyr*, which involved aliens convicted of an aggravated felony through a plea agreement, should be extended to aliens convicted at trial. The court of appeals correctly held otherwise, and its decision does not conflict with the decision of any other court of appeals. Further review is therefore unwarranted. Indeed, this Court has already denied petitions raising the claim that petitioner raises in at least three prior cases. See *Thom* v. *Gonzales*, 126 S. Ct. 40 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005).

1. In *St. Cyr*, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-

322 (citation and internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because, in the Court's view, aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving § 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325. See also *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2431-2432 & n.10 (2006) (reaffirming the *quid pro quo* basis for the holding in *St. Cyr*).

In *Rankine* v. *Reno*, 319 F.3d 93, cert. denied, 540 U.S. 910 (2003), on which the decision below relied (Pet. App. 7-8 & n.3), the Second Circuit correctly concluded that "aliens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty." 319 F.3d at 99. As the court explained in *Rankine*, unlike an alien who pleaded guilty, an alien who went to trial did not "detrimentally change[] his position in reliance on continued eligibility for § 212(c) relief." *Ibid.* An alien who pleaded guilty made a decision "to abandon any rights and admit guilt—thereby immediately rendering [himself] deportable—in reliance on the availability of the relief offered prior to IIRIRA." *Ibid.* An alien who went to trial, by contrast, did so "to challenge the underlying crime that could render [him] deportable and, had [he] succeeded, § 212(c) relief would be irrelevant." *Id.* at 99-100. In short, as *Rankine* correctly recognized, it is

"the lack of detrimental reliance on § 212(c) by those aliens who chose to go to trial" that "puts them on different footing than aliens like St. Cyr." *Id.* at 102.

2. The Second Circuit (in *Rankine*) and the Fifth Circuit (in this case) are not the only courts of appeals that have declined to extend the holding of *St. Cyr* to aliens convicted at trial. Five others have done so as well. See *Dias* v. *INS*, 311 F.3d 456 (1st Cir. 2002) (per curiam), cert. denied, 539 U.S. 926 (2003); *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002); *Montenegro* v. *Ashcroft*, 355 F.3d 1035, 1036-1037 (7th Cir. 2004) (per curiam); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121-1122 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Brooks* v. *Ashcroft*, 283 F.3d 1268, 1273-1274 (11th Cir. 2002). And, contrary to petitioner's contention (Pet. 8, 12-15), those decisions do not conflict with the Third Circuit's decision in *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (2004).

While *Ponnapula* did address the question whether the 1996 amendments to the INA apply to aliens convicted of an aggravated felony at trial before 1996, it did not hold that the amendments do not apply to *any* alien convicted at trial. The Third Circuit framed the question to be decided in *Ponnapula* as "what aliens—if any—who went to trial and were convicted did so in reasonable reliance on the availability of § 212(c) relief." 373 F.3d at 494. The court observed that, "[g]enerally speaking, reliance interests (in the legal sense) arise because some choice is made evincing reliance." *Ibid.* The court thus divided the category of "aliens who went to trial and were convicted prior to the effective date of IIRIRA's repeal of former § 212(c)" into (1) "aliens who went to trial because they declined a plea agreement that was offered to them" and (2) "aliens who went to

trial because they were not offered a plea agreement." *Ibid.* Since aliens in the latter category "had no opportunity to alter their course in the criminal justice system in reliance on the availability of § 212(c) relief," the court "highly doubt[ed]" that aliens who were not offered a plea agreement "have a reliance interest that renders IIRIRA's repeal of former § 212(c) impermissibly retroactive as to them." *Ibid.* The Third Circuit ultimately held that "aliens * * * who affirmatively turned down a plea agreement had a reliance interest in the potential availability of § 212(c) relief." *Ibid.*

Petitioner was convicted of an aggravated felony at trial, but he did not decline a plea agreement. Petitioner asserts that he "was offered the ability to enter into a plea agreement" (Pet. 12) and "rejected" it (Pet. 6). But the district court explicitly found, after giving petitioner the opportunity to conduct discovery, that the "[e]vidence in the record does not show that [he] was offered a plea" (Pet. App. 12); the court of appeals did not disturb that finding (*id.* at 8 n.3); and petitioner does not challenge it in this Court. Petitioner therefore would not be able to prevail even under the Third Circuit's decision in *Ponnapula*. With respect to aliens who were convicted of an aggravated felony at trial before the 1996 amendments to the INA and did not decline a plea agreement, there is no conflict between the decision below and *Ponnapula* on the question whether application of the 1996 amendments would be impermissibly retroactive.

3. There are three additional reasons why certiorari should be denied. First, the question presented in the petition has diminishing prospective significance, because it affects only removal proceedings for aliens convicted of an aggravated felony at trial before the 1996

amendments to the INA. That is an ever-diminishing class.

Second, it would in any event be premature for the Court to decide whether *St. Cyr*'s holding applies to aliens convicted of an aggravated felony at trial. A final rule adopted by the Department of Justice to implement *St. Cyr* by amending certain provisions of Title 8 of the Code of Federal Regulations, see *Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004), provides that the 1996 amendments to the INA apply to aliens convicted at trial. In its response to comments received on its proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for section 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[ ] and those convicted through plea agreements." *Id* at 57,828. That determination is reflected in the amended regulations, which took effect on October 28, 2004. See *id*. at 57,833 (8 C.F.R. 1003.44(a)) ("This section is not applicable with respect to any conviction entered after trial."); *id*. at 57,835 (8 C.F.R. 1212.3(h)) ("Aliens are not eligible to apply for section 212(c) relief under the provisions of this paragraph with respect to convictions entered after trial."). Only a few courts have considered these regulations in deciding whether *St. Cyr*'s holding applies to aliens convicted at trial, see, *e.g.*, *Alexandre* v. *U.S. Attorney General*, No. 05-15421, 2006 WL 1678202, at *3 (11th Cir. Apr. 12, 2006) (per curiam), and this Court should not be one of the first to do so.

Finally, there is a factual distinction between this case and *St. Cyr* that makes it an unsuitable vehicle for

deciding the question presented. In *St. Cyr*, the Court addressed the situation of aliens who pleaded guilty after Section 212(c) was amended in 1990 to render ineligible any alien convicted of an aggravated felony who had served a prison term of at least five years. A plea agreement providing for a sentence of less than five years thus would have assured the alien's eligibility for relief under the amended provision. See *St. Cyr*, 533 U.S. at 293, 321-324. In those circumstances, in which the prosecutor received the benefit of a plea agreement that was likely facilitated by the alien's belief that he would be eligible for Section 212(c) relief, the Court concluded that considerations of fair notice, reasonable reliance, and settled expectations indicated that the repeal of Section 212(c) had a retroactive effect. *Id.* at 323-324. Here, by contrast, petitioner was convicted in 1989, before Section 212(c) was amended to render a convicted aggravated felon ineligible if he served more than five years in prison. There accordingly was no distinct benefit in terms of eligibility for Section 212(c) relief in either going to trial *or* pleading guilty to the aggravated felony charge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

JULY 2006

APPENDIX A

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Date: Mar. 08, 2004

File: A39-285-860 – SAN ANTONIO

In re: HERNANDEZ-CASTILLO, ENRIQUE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Esparza Jr., Thomas Esq.

ON BEHALF OF DHS: Juan Carlos Rodriguez, Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

[ILLEGIBLE]
FOR THE BOARD

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES DISTRICT COURT

File No. : A 39 285 860 November 19, 2002

In the Matter of
Enrique Hernandez-Castillo, Respondent

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act: alien convicted of an aggravated felony as defined in Section 101(a)(43)(A) of the Act.

Section 237(a)(2)(i) of the Immigration and Nationality Act: alien convicted of a crime involving moral turpitude committed within five years after admission for which a sentence of one year or longer may be imposed.

APPLICATIONS: Section 212(c) of the Act prior to its amendment: waiver of excludability.

ON BEHALF OF RESPONDENT:

Thomas Esparza, Esquire
1811 South First Street
Austin, Texas 78704

ON BEHALF OF SERVICE:

Juan Carlos Rodriguez, Esquire
Immigration and Nationalization Service
P.O. Box 1939
San Antonio, Texas 78297

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male, native and citizen of Mexico who was admitted to the United States as an immigrant on or about April 15, 1985. On September 6, 2001, a Notice to Appear was issued charging the respondent with deportability as shown above, based upon the alleged conviction for the offense of indecency with a child, on or about September 13, 1989. At a hearing before the undersigned, the respondent, through counsel, admitted the allegations in the Notice to Appear and conceded deportability as charged.

The respondent requested an opportunity to seek relief from removal pursuant to Section 212(c) of the Immigration and Nationality Act as it existed prior to its amendment by the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The respondent also sought to apply for Section 212(c) relief pursuant to the decision of the United States Supreme Court in *INS v. St. Cyr*, 121 S. Ct. 2271 (2001). The respondent's application for that relief is in the record as Exhibit 3, and he has also provided supporting documentation. *See* Group Exhibits 4 and 5.

The Service takes the position that the respondent is not eligible for a waiver of excludability because unlike the alien in *St. Cyr*, this respondent was convicted following a plea of not guilty and he did not plead guilty

or nolo contendere. That is, the respondent did not plead to the charge that rendered him removable with an expectation that he would be eligible to file for Section 212(c) relief. The respondent argues that he should be allowed to pursue Section 212(c) relief because the respondent interprets the *St. Cyr* case to mean that retroactive elimination of Section 212(c) relief is prohibited.

The Court had a chance to review the case law in this matter prior to the hearing on the merits, and found several cases where the Federal Courts on this very issue, have determined that *St. Cyr* does not apply to aliens like this respondent who contested the criminal charge and did not plead guilty or nolo contendere. *See Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001); *United States v. Herrera-Blanco*, 232 F.3d 715 (9th Cir. 2000); *Bensusan v. Reno*, 225 F.3d 653 (4th Cir. 2000).

I also note that the Supreme Court case held that it was possible reliance upon the availability of Section 212(c) relief that resulted in its ruling that aliens that pled to the criminal charge against them should not be deprived of their eligibility to apply for Section 212(c) relief because they may have made that plea in reliance upon the availability of relief. This respondent can make no such argument because he, in fact, pled not guilty and exercised his right to a trial.

I've also reviewed the proposed regulations to see if they might provide some benefit to this respondent if they were to become final in the form in which they are proposed. However, having reviewed those proposed regulations which would amend some parts of 8 C.F.R. Section 3, Section 212, and Section 240, it does not appear that they would provide any benefit to this respondent in the form in which they are proposed. They

do provide that, under some circumstances, an alien who is convicted prior to April 1, 1997, retains eligibility for Section 212(c) relief. Nonetheless, that eligibility is limited to respondents who were convicted pursuant to plea agreements.

Accordingly, I find that the respondent is unable to establish eligibility for Section 212(c) relief for the reasons stated herein. The respondent has not applied for any other form of relief from removal, nor does it appear that he would be eligible for any such relief.

The following orders are hereby entered.

ORDERS

IT IS ORDERED that the respondent's application for a waiver of excludability pursuant to Section 212(c) of the Act prior to its amendment, be pretermitted and denied for statutory ineligibility

IT IS FURTHER ORDERED that the respondent be removed from the United States to Mexico on the charges contained in the Notice to Appear.

GLENN P. McPHAUL
Immigration Judge

No. 05-1251

FILED
AUG 7 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ENRIQUE HERNANDEZ-CASTILLO,

Petitioner,

v.

ALBERTO R. GONZALES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

SIMON AZAR-FARR
Counsel of Record
SIMON AZAR-FARR & ASSOC., P.C.
2313 North Flores
San Antonio, TX 78212
(210) 736-4122

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REPLY BRIEF FOR PETITIONER

Petitioner Enrique Hernandez-Castillo's petition presents to the Supreme Court a circuit split regarding whether there is a legal distinction between alien defendants who went to trial involuntarily and those who chose trial over a plea bargain, such that the latter can be found to have a reliance interest in the availability of relief from deportation under § 212(c) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182 (INA).

As we explained, the Third Circuit recognizes that electing to go to trial, and denying a proffered plea agreement, has a reliance interest in the availability of such relief, in the same way that an alien who accepted the plea agreement would have. The key here is that the alien chose to "alter [his] course in the criminal justice system in reliance on the availability of § 212(c) relief." (Resp. 8, quoting *Ponnapula v. Ashcroft*, 373 F.3d 480, 494 (CA3 2004).)

Respondents incorrectly assert that "Petitioner . . . did not decline a plea agreement," and point to the record in the District Court. (Resp. 8.) However, Petitioner did receive a plea offer, and he did decline such an offer *in reliance on the availability of § 212(c) relief* if at trial he was found guilty. (Pet. App. 9.) Evidence of this arrangement was not made available in the District Court, due to the challenges of obtaining an affidavit from Petitioner in a small rural town in Mexico, to which he had been deported. However, an affidavit was obtained, stating that he chose to reject the plea offered and that it was "[his] understanding at the time that [he] would be able to apply for immigration relief even if [he] were convicted of the charge." *Ibid.* This evidence was before the Fifth Circuit,

however its *relevance* was challenged. (Pet. App. 12, at 8 n.3.)

It is the logic of the Fifth Circuit's interpretation of this evidence that is challenged by Petitioner. The Fifth Circuit stated that it was "nonsensical" to equate the refusal to take a plea agreement with detrimental reliance on § 212(c) because that choice does not affect an alien's immigration status "[u]nless and until [he is] convicted." *Ibid.* However, it is clearly the case that an alien who elects to go to trial places himself on a path which can end in removal. Perhaps more importantly, even an alien who pleads guilty and becomes removable at the time of the plea is not automatically removed. For many such aliens, removal never occurs, and they continue to live legally in the United States for years, decades, even for the remainder of their lives. The fact that they *could* be put into removal proceedings, and *could* be found to be removable, is no more certain than that an alien *could* be found guilty and thus later *could* be found to be removable. An alien who chooses to decline a plea agreement and go to trial with the expectation that if he is found guilty, § 212(c) relief will still be available has a reliance interest in the availability of such relief, just the same as an alien who accepts the plea agreement does.

Respondents make three additional arguments for why the Supreme Court should not hear this case. All three are irrelevant.

First, Respondents note that the issue has "diminishing prospective significance," because it affects only "an ever-diminishing class." This is irrelevant because an unconstitutional application of a federal law is unconstitutional regardless of whether the pool of people harmed by

that application is growing or shrinking. Certainly this Court did not hesitate to consider the harm to only a single person when it considered *Bush v. Gore*, 531 U.S. 98 (2000).

Second, Respondents argue that it would be premature to consider this question while the Department of Justice is receiving comments on a proposed rule. (*See* Resp. 9.) The rule that is being considered would resolve the circuit split against Petitioner, and thus would be susceptible to the same constitutional challenge before the Court today. It is no argument that the Supreme Court should not hear a case merely because the Executive Branch is considering adopting a rule which would resolve the case when it is the constitutionality of such a rule that is being challenged. The Justice Department, unlike the Supreme Court, is not qualified to determine the constitutionality of this question, so this Court should not defer to it.

Further, for the sake of efficiency, it is better to resolve the constitutional issue now, so that the Justice Department would have such guidance as it determines whether to adopt the rule as currently framed, rather than to wait for the rule to be adopted and applied, and then bring a later challenge to it – making all the same arguments before the Court in this case.

Third, Respondents assert that in 1989, when Petitioner declined the plea agreement and chose to go to trial, there was "no distinct benefit in terms of eligibility for Section 212(c) relief in either going to trial *or* pleading guilty." (Resp. 10.) This assumes that the Petitioner was choosing between trial and the plea on the basis of § 212(c) relief alone; however, as Petitioner explains in

his affidavit, "I maintained my innocence at the time and still do, even though I recognize a jury did find me guilty." (Pet. App. 9, at 4.) For Petitioner, this was *also* a factor in his decision to decline the proffered plea agreement. Most decisions of this magnitude are made based on multiple factors, and for Mr. Hernandez-Castillo, the two most important concerns were his belief in his innocence and the availability of relief from removal. Had he been aware, in 1989, that a law enacted in 1996, would render him ineligible for such relief, the choice he made may well have been different. That is the very nature of reliance which this Court addressed in *INS v. St. Cyr*, 533 U.S. 289 (2001).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SIMON AZAR-FARR
Counsel of Record
SIMON AZAR-FARR & ASSOC., P.C.
2313 North Flores
San Antonio, TX 78212
(210) 736-4122